
The Committee on Energy and Commerce
Internal Memorandum



May 11, 2011

MEMORANDUM

To: Members, Subcommittee on Communications and Technology

From: Majority Committee Staff

Re: Subcommittee Hearing on: "FCC Process Reform"

The Subcommittee will hold a hearing on May 13, 2011, at 9:30 a.m. in 2123 Rayburn House Office Building entitled "FCC process reform".

Witnesses

One panel of witnesses will testify:

1. Chairman Julius Genachowski
2. Commissioner Michael J. Copps
3. Commissioner Robert M. McDowell
4. Commissioner Mignon Clyburn
5. Commissioner Meredith Attwell Baker

Background and Issues

There is growing consensus that Federal Communications Commission (FCC) processes need reforming. Under both Democrat and Republican chairmen, the FCC has fallen into practices that weaken decision-making and jeopardize public confidence. While Chairman Genachowski and his predecessors have taken steps to improve process, the time may have come to do so statutorily to ensure consistency from issue to issue, and commission to commission. For example, the following reforms could be considered:

Notices of Inquiry. The FCC could be required to start new rulemaking proceedings with a notice of inquiry rather than a notice of proposed rulemaking (NPRM). An NPRM presumes regulation is needed. The FCC should first examine the state of the relevant markets, services, and technologies in a notice of inquiry. Even if regulation is appropriate, the FCC will have a harder time determining that and is unlikely to know how best to craft a proposed regulation without first asking orienting questions and gathering preliminary information.

Publishing Proposed Rules. The FCC does not always publish the text of proposed rules for public comment before adopting final rules, instead merely asking a collection of open-ended questions or offering a series of alternative approaches. Providing specific text for a particular proposal will allow for more constructive input and a better end product. Crafting proposed rules should not be difficult if there is a genuine need and the FCC has started with a notice of inquiry.

Minimum Comment Periods. Statutory minimums for comment and reply cycles would produce better decisions and shield the FCC from pressure to rush to judgment.

Minimum Review Periods. Commissioners have no assurances they will be afforded sufficient time to review draft items, which are prepared at the FCC chairman's direction. This is particularly true if the item is undergoing negotiated edits among a subset of commissioners, is subject to statutory deadline, or is set for an open meeting. Minimums could apply to both the time between close of a pleading cycle and delivery of a draft, and between delivery of a draft and a vote.

Shot Clocks. Parties and the public should have some sense of when resolution will come.

Publication of Item Status. The FCC now makes information available about which draft items are circulating before the commissioners. The FCC could be required to provide additional information, such as a list of all unfinished items at the Commission, the date the items were initiated, their current status, and expected date of completion.

Publication of Final Draft. For an item scheduled for an open meeting, the FCC could be required to make the final draft public a certain amount of time in advance so everyone knows precisely what the commissioners are being asked to vote on.

Time Limits for Release. Many believe that the Commission should be required to release the text of its orders promptly—not in weeks or months after their adoption.

Commissioner Initiation of Items. The chairman, as agency “CEO,” controls the Commission's agenda. But a bipartisan majority of commissioners other than the chairman could be allowed to initiate items to prevent a chairman from stopping consensus items.

Showings of Initial and Continued Need. The President's Memorandum for the Heads of Executive Departments and Agencies, “Regulatory Flexibility, Small Business, and Job Creation” (76 Fed. Reg. 3827 (January 21, 2011)), requires executive agencies to conduct cost-benefit analyses before adopting regulations. Although Chairman Genachowski has said he agrees with the principles of the memorandum, it does not apply to independent agencies like the FCC. The FCC could be required before adopting any regulation to identify actual consumer harm; conduct economic, market and cost-benefit analyses; and include performance measures by which the regulation would be periodically evaluated. If any existing regulation fails to perform, the FCC could be required to eliminate it.

Transaction Review Standards. The FCC's transaction review standards are vague, afford the Commission too much discretion, and are susceptible to abuse. Parties with a pending transaction should not feel pressure to accept "voluntary" conditions on the deal or to curtail their advocacy in other proceedings. To minimize this, the FCC could be prohibited from adopting any conditions unless they are narrowly tailored to any transaction-specific harm. To prevent the FCC from using transactions to commence industry-wide changes it could not otherwise adopt, the FCC could be required to show statutory authority for the conditions outside the transaction review provisions of the Act.

Ex Parte Filings. To ensure everyone has a full opportunity to review record materials, the FCC could be prohibited from including in an item any material submitted less than a certain amount of time prior to adoption.

Sunshine Reform. The sunshine laws prohibit more than two commissioners from gathering in an official capacity outside an open meeting. There is concern this hinders the ability of the commissioners to negotiate and reach decisions. To address this, three or more commissioners could be allowed to gather so long as the gathering is bipartisan and procedural safeguards are in place, such as attendance by a representative of the General Counsel's Office.

Schedule of Statistical Reports. The FCC is increasingly relying on statistical reports. This is appropriate, because the FCC should not be intervening absent evidence of a market failure. The FCC does not always release these reports in a timely fashion, however, even when they are statutorily mandated. At the beginning of each year, the FCC could be required to announce the scheduled release of its planned reports. The FCC could also be prohibited from proposing related regulations unless the relevant statistics have been issued within a certain time period. Doing so would help ensure any regulatory proposal is based on current data.

Quarterly Scorecard. To assess the FCC's performance, the FCC could be required to submit a quarterly scorecard documenting the average time it took to complete its adopted items, the average amount of time uncompleted items have been pending, and the percent of items that have fallen outside deadlines described above.

State of the Industry. To help ensure chairmen are taking a big-picture view and communicating their agenda, they could be required to present a periodic "state of the industry" report to Congress identifying the challenges and opportunities in the marketplace for jobs and the economy, and the items they propose to move to address those issues.

If you need more information, please call Neil Fried or David Redl at 5-2927.